Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARRY L. REYNOLDS, JR.,
Petitioner,
v.
INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS *
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

DAVID J. YOUNG
JOHN R. GALL
PAMELA HACKES THURSTON
PHILOMENA M. DANE
SQUIRE, SANDERS & DEMPSEY
41 South High Street
Suite 1300
Columbus, Ohio 43215
(614) 365-2700

ARTHUR VON MEHREN
HARVARD LAW SCHOOL
Cambridge, MA 02138
(617) 495-3193

CHARLES F. CLARKE
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

Counsel for Petitioner

* Counsel of Record

October 12, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

13 pp

TABLE OF AUTHORITIES

CASES — Page

American Greetings Corp. v. Cohn, 839 F.2d 1164 (6th Cir. 1988) 2

Barclays Bank, Plc. v. Franchise Tax Bd., 113 S. Ct. 2268 (1994) 8

Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257 (9th Cir. 1989) 6

Burt v. Board of Regents of the Univ. of Neb., 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986) 5, 6

Calder v. Jones, 465 U.S. 783 (1984) ..... *passim*

Carteret Savs. Bank, F.A. v. Sushan, 954 F.2d 141 (3d Cir.), *cert. denied*, 61 U.S.L.W. 3256 (1992) 5

Casualty Assurance Risk Ins. Brokerage Co. v. Dillon, 976 F.2d 596 (9th Cir. 1992) 7

Columbus Show Case Co. v. CEE Contracting, Inc., 599 N.E.2d 881 (Ohio Ct. App. 1992) 2

Core-Vent Corp. v. Nobel Indus., AB, 11 F.3d 1482 (9th Cir. 1993) 5, 6

Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384 (8th Cir. 1991) 7

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 2

Fallang v. Hickey, 532 N.E.2d 117 (Ohio 1988) 3

First American First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511 (4th Cir. 1986) 5

Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986) 6

Hicklin Eng'g, Inc. v. Aidco, Inc., 959 F.2d 738 (8th Cir. 1992) 7

Hugel v. McNell, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990) 6, 7

Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, 1994 U.S. App. LEXIS 21817 (7th Cir. Aug. 12, 1994) 7

Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987) 6

Nehemiah v. The Athletics Congress of the United States, Inc., 765 F.2d 42 (3d Cir. 1985) 8

Norris v. Oklahoma City Univ., 1994 U.S. App. LEXIS 7975 (9th Cir. Apr. 5, 1994) 6

TABLE OF AUTHORITIES—Continued

	Page
Sinatra v. National Enquirer, Inc., 854 F.2d 1191 (9th Cir. 1988)	5, 7
U.S. Sprint Comm. Co. v. Mr. K's Foods, Inc., 624 N.E.2d 1048 (Ohio 1994)	3
STATUTES	
Ohio Rev. Code Ann. § 2307.382	3
INTERNATIONAL CONVENTION	
United Nations Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517 (1958)	9

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Brief in Opposition, the IAAF argues that this case is not suitable for review because (1) an independent state ground exists to justify the court of appeals' decision, (2) the decision of the court below was grounded in a "fact-based analysis," and (3) considerations unique to the athletic nature of the activity it regulates and coordinates make judicial intrusion of any kind unworkable. None of these assertions has merit.

I.

No independent state law ground supports the Sixth Circuit decision. The Sixth Circuit simply did not rely on the Ohio long-arm statute to determine jurisdiction with respect to Reynolds' intentional tort claims.[1] To the contrary, it explicitly held that adjudication of those claims in Ohio did not satisfy the requirements of due process.

The very language of the Sixth Circuit's analysis makes this plain. App. 18a-20a. At the threshold it observed that the district court had premised jurisdiction on "the provision of the Ohio long-arm statute which provides that

---

[1] Contrary to the IAAF's claim, the "tort" at issue here is not just a single defamatory press release. Reynolds alleged the two intentional torts of defamation and tortious interference with business relations. Each of those claims encompassed the IAAF's repeated false statements that Reynolds had tested positive for steroid use, its active obstruction of Reynolds' ability to compete for over two years, including in the 1992 Olympic Games, and its interference with Reynolds' numerous endorsement contracts. The district court considered all of this conduct and granted relief on both claims, premising personal jurisdiction over the IAAF upon the Ohio statute that covers intentional torts causing injury in Ohio. App. 39a-40a, 55a-56a, 85a-86a. The Sixth Circuit overturned the district court judgment with respect to both intentional tort claims based on the due process analysis that is the subject of Reynolds' petition to this Court. *See* App. 20a. As is evident from his Question Presented, Reynolds seeks this Court's review and reversal with respect to both claims. The IAAF is flatly wrong in asserting that Reynolds has in any way abandoned his tortious interference claim in this proceeding.

a party is amenable to suit by 'causing tortious injury in this state . . . by an act outside this state.' O.R.C. § 2307.382(A)(6)." App. 18a. Acknowledging that a tort action can be brought where the injury is suffered, the court went on to summarize some of the fact findings upon which the district court had based its exercise of jurisdiction:

> Reynolds claimed a loss of more than $4,000,000 in Ohio because of the IAAF's false press release and the district court specifically found that the injury to Reynolds was in Ohio, holding "[t]he IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastating effect upon plaintiff."

App. 18a. The circuit court accepted these findings without question. Nonetheless it declared:

> More needs to be demonstrated, however. The question remains whether the IAAF, in making the alleged defamatory statements in England, had *minimum contacts* with Ohio.

App. 19a (emphasis added). With that the Sixth Circuit began its due process analysis, which revolved around *Calder v. Jones*, 465 U.S. 783 (1984), and the core constitutional question of what "minimum contacts" are sufficient. The court's judgment that the IAAF could not be sued in Ohio for defamation and tortious interference rested solely on its holding that due process was not satisfied in the absence of particular facts that it noted were present in *Calder*. App. 19a-20a.[2]

Moreover, under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the Sixth Circuit could not have applied the

---

[2] As a practical matter, due process determines both the statutory and the constitutional limits of jurisdiction in Ohio. Because Ohio's long-arm statute and rule authorize jurisdiction to the full extent that due process allows, "an Ohio personal jurisdiction analysis becomes an examination of constitutional limitations." *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1167 (6th Cir. 1988) (citation omitted). *Accord, Columbus Show Case Co. v. CEE Contracting, Inc.*, 599 N.E.2d 881, 884 (Ohio Ct. App. 1992).

Ohio long-arm statute to preclude jurisdiction because the Ohio Supreme Court has determined that the long-arm statute is satisfied when a defamatory statement is published in Ohio resulting in injury to the reputation of an Ohio resident. *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988). *Fallang* was a defamation action in which the Ohio Supreme Court upheld jurisdiction under the state long-arm statute [3] and the Due Process Clause based on contact factors identical to those here. 532 N.E.2d at 118-20 (citing *Calder*).[4]

Accordingly, due process was the only basis on which the Sixth Circuit could possibly have denied jurisdiction,[5] and it was the sole basis for the court's decision.

---

[3] *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988), literally relied on Ohio R. Civ. P. 4.3, which has been held coextensive with the long-arm statute set forth in Ohio Rev. Code Ann. § 2307.382. *U.S. Sprint Comm. Co. v. Mr. K's Foods, Inc.*, 624 N.E.2d 1048, 1051 n.2 (Ohio 1994) (quoting *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 559 N.E.2d 477, 479 (Ohio 1990), *cert. denied*, 499 U.S. 975 (1991)).

[4] In *Fallang*, the intentional nature of the tort of libel satisfied long-arm standards, just as it had satisfied due process standards in *Calder v. Jones*, 465 U.S. 783 (1984). Thus, the IAAF gains nothing by arguing that the district court finding of malice does not establish the intent required by the long-arm statute. Brief for Resp't in Opp. ("Res. Br.") at 12-13 n.13. Contrary to the IAAF's assertion, it makes no difference whether the IAAF's *motive* was principally to injure Reynolds or to protect the credibility of its testing laboratory, just as it made no difference in *Calder* whether the defendants' *motive* was to injure Shirley Jones or to enhance their own journalistic reputations and increase sales of the *National Enquirer*. In both cases, the alleged torts were intentional by nature, and it is that intentional nature that justifies holding defendants accountable for the resulting injury wherever it predictably occurs.

[5] Its due process ruling, however, placed the Sixth Circuit in conflict with the Ohio Supreme Court, creating an independent basis for review. *See* Brief for the States of Ohio and Mont. as *Amici Curiae* in Supp. of Pet'r at 26-27. If the decision below is allowed to stand, it will be possible for a plaintiff to sue a nonresident intentional tortfeasor in an Ohio state court, properly invoking its personal jurisdiction under *Fallang*, only to have the defendant

II.

The IAAF seeks to trivialize the issues at stake here by describing the Sixth Circuit ruling as a "fact-bound analysis." The detail of its description, however, illustrates most clearly that the lower courts addressing intentional tort claims are divided about the due process implication of plaintiff's residence in the forum and the significance, if any, of the additional contact factors mentioned in *Calder*.

The essential rule of *Calder* was stated in its concluding paragraphs:

> In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.
>
> * * * *
>
> We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California.

465 U.S. at 790-91. This language suggests that directing an intentional tort at an individual makes it predictable that the individual will be injured in his state of residence, such that the intentional tortfeasor can be said to have "purposely availed" himself of the privilege of causing effects in that forum and should reasonably expect to be haled into court there. So stated, the due process standard of *Calder* plainly supports Ohio's assertion of jurisdiction over the IAAF in the present case.

The *Calder* opinion, however, did also identify other contact factors linking the defendants to the forum in that case, without addressing the constitutional significance of those contacts. The Court observed:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television

---

remove to federal court and obtain dismissal under the Sixth Circuit ruling in *Reynolds*. This is manifestly intolerable.

> career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

Id. at 788-89.

This language logically accounts for treating an individual plaintiff's home state as a place where he will predictably be injured by defamation and also for why a plaintiff should be permitted to sue there. The lower courts, however, have not uniformly adopted that view. Some courts have interpreted *Calder* as holding that intentionally targeting an individual *plaintiff* is enough to constitute "purposeful availment" of the forum where that plaintiff resides.[6] Others have required additional evidence that the intentional tortfeasor aimed his conduct at the forum *territory* as such—*i.e.*, evidence that defendant knew the plaintiff was a forum resident and/or knew the defamatory communication or other harmful agent was likely to enter the forum.[7] Still others have used language argu-

---

[6] *Carteret Savs. Bank, F.A. v. Shushan*, 954 F.2d 141, 148 (3d Cir.), *cert. denied*, 61 U.S.L.W. 3256 (1992) ("[t]hat the article might harm the plaintiff, a California resident, in her home state should be sufficiently foreseeable, such that haling the defendant into court in the forum state would not violate notions of fair play and substantial justice"); *Burt v. Board of Regents of the Univ. of Neb.*, 757 F.2d 242, 245 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986) ("no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim"). *See also First American First, Inc. v. National Ass'n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986) ("NABW knew or should have known that its allegedly defamatory letters [distributed nationally] would inflict the greatest injury upon Leake in the state in which he resided and conducted his business").

[7] *See Core-Vent Corp. v. Nobel Indus., AB*, 11 F.3d 1482, 1486 (9th Cir. 1993); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988) (imputing knowledge of plaintiff's residence to foreign defendant through its agent). *Cf. Core-Vent*, 11 F.3d at

ably consistent with both views.[8] This case is the only one, however, in which a circuit court's holding has relegated the state of plaintiff's residence to a "mere fortuity" in the jurisdictional analysis. See Res. Br. at 14.

Another source of disparity among lower courts has been *Calder*'s observation that California was "the focal point," not only of the harm to plaintiff, but of the defamatory report itself. See *Core-Vent Corp. v. Nobel Indus., AB,* 11 F.3d 1482, 1486, 1492 (9th Cir. 1993) ("[u]nlike in *Calder,* the articles cannot be seen as a comment on a California event"; dissent says *Calder* did not rely on this factor); *Norris v. Oklahoma City Univ.*, 1994 U.S. App. LEXIS 7975 (9th Cir. Apr. 5, 1994) ("although appellee sent the transcripts to a California audience, the transcripts themselves concerned Norris's grades and achievements in Oklahoma . . . ."); *Burt v. Board of Regents of the Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds,* 475 U.S. 1063 (1986) (finding jurisdiction in Colorado although "the 'focal' point of the story was Nebraska"; dissent chided, "We thus have but half a *Calder*"). Until this case, however, no circuit court had used "the focal point of the story" as grounds for denying an individual plaintiff access to the courts of his home state.

Lower courts have also differed over the constitutional importance to be placed on *Calder*'s observation that the *National Enquirer* had its widest circulation in California.

1492 (dissent argued such knowledge was "not a prerequisite" in *Calder*).

[8] *See e.g., Hugel v. McNell,* 886 F.2d 1, 5 (1st Cir. 1989), *cert. denied,* 494 U.S. 1079 (1990) ("[t]he McNells knew that the release of the allegedly false information would have a devastating impact on Hugel, and it can be fairly inferred that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant."); *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1259 (9th Cir. 1989); *Lake v. Lake,* 817 F.2d 1416, 1423 (9th Cir. 1987); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.,* 784 F.2d 1392, 1398 (9th Cir. 1986).

In context, *Calder* apparently treated this fact as an additional indicator that the libel would predictably injure the plaintiff in her home state. See 465 U.S. at 489. *Accord, Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) ("[t]he fact that some of the 'passing off' occurred in South Dakota, along with the fact that Industries' principal place of business is in South Dakota, demonstrates that Sportswear's actions were uniquely aimed at the forum and that the 'brunt' of the injury would be felt there, as required by *Calder*"). Numerous lower courts, however, have inferred that the newspaper's circulation had broader significance in the *Calder* due process analysis.[9] This case is the first to require not only that defamatory statements be published in the forum, but also that the defendant publish them there personally.[10] *Contra, Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1197-98 (9th Cir. 1988).

Given the diverse applications of *Calder* by the lower courts, it is no hindrance to this Court's review that the Sixth Circuit purported to "distinguish" *Calder* on factual grounds. To the contrary, the Sixth Circuit holding offers this Court an ideal occasion to clarify the demands of due process in the intentional tort setting. By elevating *Calder*'s additional facts to a jurisdictional standard, the Sixth Circuit has sharply illuminated the need for guidance by this Court as to the limits that confine a state's power to adjudicate the claims of its own citizen against a foreign intentional tortfeasor.

---

[9] *See Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club*, 1994 U.S. App. LEXIS 21817, at *5 (7th Cir. Aug. 12, 1994) (television broadcasts would constitute "entry" into forum if *Calder* requires "entry"); *Casualty Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596, 599-601 (9th Cir. 1992); *Hicklin Eng'g, Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992).

[10] There is, of course, no question here that the defamatory statements were actually published in Ohio, as acknowledged by the Sixth Circuit itself. App. 19a.

III.

The IAAF has also asserted that, because its decisions involve the regulation and coordination of a world-wide sporting activity, it should not be subject to the judicial power of any one nation. It also claims that its own arbitration procedures provide an independent review of its decisions. These "policy" arguments, however, are fatally flawed in several respects.

First, the mere fact that the IAAF regulates sporting activity and derives its income from such regulation does not, under the Due Process Clause, give it special immunity from the judicial processes of this Country.[11] To hold otherwise would allow entities like the IAAF to act with complete impunity, leaving American citizens under their power without any realistic prospect of redress for even the most damaging intentional wrongdoing. See Brief for the States of Ohio and Mont. as *Amici Curiae* in Supp. of Pet'r at 13-14.

Second, resolution of the important jurisdictional question presented here will not inhibit the proper regulation of sport any more than the Court's decision in *International Shoe* inhibited the orderly development of interstate and international commerce. Many multinational business entities carry on extensive commercial operations in numerous countries and, in the course of doing so, adhere to the laws and customs of each such country individually. *Barclays Bank, Plc. v. Franchise Tax Bd.*, 113 S. Ct. 2268 (1994).

Third, the IAAF's existing "arbitration" procedures do not provide a fair and independent means by which IAAF eligibility decisions can be reviewed. As the district court recognized, the sham nature of the "arbitration" conducted in this case was evidenced by, among other things, the

---

[11] *See Nehemiah v. The Athletics Congress of the United States, Inc.*, 765 F.2d 42, 48 (3d Cir. 1985) ("[n]or do we find persuasive IAAF's argument that it would be 'intolerable' as a matter of domestic and international law to subject it to jurisdiction *anywhere* in the United States").

IAAF's persistent refusal to disclose critical exculpatory evidence concerning Reynolds, the tribunal's refusal to consider relevant scientific evidence at all, and the IAAF's repeated statements and suggestions to Reynolds that any challenge to his suspension would ultimately be futile. App. 61a-65a.

The "arbitration" tribunal in this case was, in addition, not independent in any sense of that term, but rather was simply a part of the IAAF. It was composed of three members selected by the IAAF from an existing six-member committee of the IAAF itself. The General Secretary of the IAAF controlled all communications with the tribunal selected for this case. Neither TAC nor Reynolds had any role in the selection process whatsoever.[12]

Fourth, contrary to the IAAF's claim, this case does not involve the potential for displacement of existing IAAF rules. In *Reynolds I*, the district court and the Sixth Circuit required Reynolds to exhaust his administrative remedies prior to seeking any judicial relief and he did so. His state law causes of action in *Reynolds II* were narrowly tailored to address the IAAF's failure to follow its own rules and the harm to him arising out of those

---

[12] Reynolds was not obligated, as the IAAF now suggests, to request that English courts set aside the "arbitration" decision pursuant to the United Nations (New York) Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517 (1958), reported at 9 U.S.C. § 201 ("Convention"). The Convention only applies where an agreement to arbitrate involves a "commercial" dispute and is in writing and signed by both parties—preconditions that were not present in this case. App. 8a. Moreover, irrespective of whether Reynolds was empowered or obligated to request that the "arbitration" decision be set aside, he was and is able to contest its applicability to him in this country. The Convention makes it clear that the courts of every signatory country may determine the extent to which any arbitral award qualifies for recognition and preclusive effect within its boundaries. The district court in this case did not "vacate" the London arbitration decision in any sense which the Convention embodies. It simply declined to give the award preclusive effect in the United States for the reasons identified in its decision.

failures, including the IAAF's purposeful avoidance of the fact of his innocence in order to protect the credibility of its affiliated laboratory. App. 67a.

CONCLUSION

For all of the foregoing reasons, review by this Court of the ruling below will appropriately resolve the conflicts among the circuits respecting the scope and application of *Calder*. The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

DAVID J. YOUNG
JOHN R. GALL
PAMELA HACKES THURSTON
PHILOMENA M. DANE
SQUIRE, SANDERS & DEMPSEY
41 South High Street
Suite 1300
Columbus, Ohio 43215
(614) 365-2700

ARTHUR VON MEHREN
HARVARD LAW SCHOOL
Cambridge, MA 02138
(617) 495-3193

CHARLES F. CLARKE
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

Counsel for Petitioner

* Counsel of Record

October 12, 1994